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81-2184

NO.

In The

SUPREME COURT OF THE UNITED STATES OF AMERICA

October Term, 1981

ROBERT F. PARRATT, Warden,

Petitioner,

vs.

JESSE J. FORD,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

J. William Gallup
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1100 Farm Credit Building
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Telephone (402) 422-0800
Attorney for Respondent

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CASES CITED

Summer v. Mata, 449 U.S. 539 (1981)	1,2,5
State v. Ford, 200 Neb. 779, 781, 265 N.W. 2d 456, 457 (1978)	2,3
Johnson v. Zerbst, 304 U.S. 458 (1937)	3

QUESTIONS PRESENTED FOR REVIEW

1. Is the opinion of the Circuit Court inconsistent with Summer v. Mata, 449 U.S. 539 (1981)?

OPINIONS DELIVERED BY THE COURTS BELOW

The respondent accepts the opinions enumerated by petitioner.

GROUNDS FOR JURISDICTION

The respondent agrees with petitioner's stated grounds for jurisdiction with the exception of (4).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The respondent accepts the petitioner's statement of the Constitutional provisions involved.

STATEMENT OF THE CASE

The respondent accepts petitioner's statement of the case.

ARGUMENT

I.

The opinion of the Circuit Court is not inconsistent with the holding of this court in Summer v. Mata.

Respondent pled guilty to a rape charge and received a sentence of fifteen to twenty-five years. The black defendant was thus treated to a sample of Mississippi justice by a Nebraska Court.

The United States Circuit Court of Appeals for the Eighth Circuit wrote an opinion which was not only a model of clarity but it also upheld the traditions of justice that have always set this country apart from others. Its opinion was in keeping with the law in all respects, and its judgment was vacated only because it failed to cite which one of the seven conditions set forth in section 2254(d) it found present. On remand the Circuit Court, not surprisingly, reached the same conclusions, but this time it cited section 2254(d) (1) of 28 U.S.C. to support its decision and comply with Summer v. Mata. The case should have ended when the Circuit Court filed its second opinion. It didn't, however, because the representatives of the State of Nebraska, who usually decry the endless appeals they must endure at the hands of prisoners, have petitioned this Court for the second time. A quick denial of the petition will be a start in weeding out those frivolous cases that have clogged the wheels of justice and led the Court's Chief Justice to complain about the Court's heavy volume of work.

The Assistant Attorney General representing the petitioner, and who seems bent upon making a career out of this case, does not understand either the facts of this case or its ratio decidendi.

First of all, the issue of whether Ford was denied effective assistance of counsel was presented to the Nebraska Supreme Court and the Nebraska Supreme Court specifically found that "the defendant was represented by competent counsel throughout the original proceedings." State v. Ford, 200 Neb. 779, 781, 265 N.W. 2d 456, 457 (1978). The Nebraska Supreme Court, however, did not make a factual determination as to whether Ford's attorney's

failure to investigate the rumored pregnancy denied Ford the effective assistance of counsel. The Nebraska Supreme Court never answered the allegations of incompetency except to conclude that counsel had been competent. The only reference to the rumored pregnancy in the opinion was the following:

> "The defendant also testified that since a possibility existed that the victim was pregnant, his guilty plea was somehow involuntary. The argument does not even merit discussion." (Emphasis added) State v. Ford, 200 Neb. 779, 265 N.W. 2d 456 (1978).

There never was any "finding" by the Nebraska Supreme Court on the issue of whether counsel was ineffective in failing to investigate the pregnancy rumor. There wasn't any determination by the state court on this matter and the circuit court was not, as petitioner contends, overriding a previous determination. It simply concluded, after reading the record with glasses ground to the prescription of justice, that the merits of the factual dispute with respect to incompetency of counsel were not resolved in the state court hearing. It then cited 28 U.S.C. section 2254 (d) (1). That the merits were not resolved is apparent from a one-eyed glance at the Nebraska Supreme Court opinion.

II.

The judgment of the Circuit Court was not in conflict with the decision of this Court in Johnson v. Zerbst.

The petitioner cites Johnson v. Zerbst, 304 U.S. 458 (1937) as authority for its position that the Circuit Court failed to give a presumption of regularity to judgments of lower courts.

This argument is the same one advanced in his first argument, to wit: that the opinion of the Circuit Court is inconsistent with this Court's holding in Mata. We repeat, to the point of monotony, the state courts reached no conclusions as to whether the failure to investigate the rumored pregnancy constituted ineffective assistance of counsel. The state court said this did not even merit discussion. The Circuit Court was clearly thus not substituting its judgment for that of the state court, since the state court had never passed judgment on that point, refusing even to consider it.

III.

The finding of the Circuit Court that Ford did not have effective assistance of counsel when he pled guilty was consistent with decisions of this Court.

The cases cited by petitioner to support his claim that Ford should have been denied relief by the Circuit Court were all carefully discussed by the Circuit Court in its opinion and distinguished. The respondent can add nothing to the treatment given them by the Circuit Court.

CONCLUSION

The Court should deny certiorari in this case.

JESSE FORD, Respondent,

By J. William Gallup

J. William Gallup
1100 Farm Credit Building
Omaha, NE 68102
(402) 422-0800

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Respondent's Brief in Opposition to Petition for a Writ of Certiorari upon the Petitioner by mailing said copy by U.S. mail, postage prepaid, addressed to Marilyn B. Hutchinson, Assistant Attorney General, 2115 State Capitol, Lincoln, Nebraska 68509, on this 5 day of August, 1982.

J. William Gallup

SUBSCRIBED in my presence and sworn to before me on this 5 day of August, 1982.

Notary Public

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NO. [redacted]

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1981

ROBERT F. PARRATT, Warden,

Petitioner,

vs.

JESSE J. FORD,

Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The Respondent, Jesse J. Ford, by and through his attorney, asks leave to proceed in forma pauperis pursuant to Rule 53.

The Affidavit of Respondent's counsel in support of this motion is attached hereto.

JESSE J. FORD, Respondent,

By J. William Gallup

J. William Gallup
1100 Farm Credit Building
Omaha, NE 68102
(402) 422-0800
Attorney for Respondent

10

NO. 80-1561

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1981

ROBERT F. PARRATT, Warden,

Petitioner,

vs.

JESSE J. FORD,

Respondent.

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

STATE OF NEBRASKA)
)ss.
COUNTY OF DOUGLAS)

I, J. William Gallup, being first duly sworn according to law, depose and say in support of Jesse J. Ford's Motion for Leave to Proceed in Forma Pauperis:

1. I am the court-appointed attorney for the Respondent.

2. That I was appointed by the United States District Court to represent Mr. Ford in the United States District Court, and I was later appointed by the Circuit Court of Appeals to represent Mr. Ford in that Court.

3. That Jesse J. Ford is without funds to pay the costs of printing a response to Petitioner's brief.

4. That Jesse Ford is indigent to my knowledge and has been adjudged indigent by both the United States District Court

and the Circuit Court of Appeals.

5. That attached to this Affidavit and incorporated by reference is a letter to affiant from the Circuit Court of Appeals.

J. William Gallup

J. William Gallup

SUBSCRIBED and sworn to before me this 4 day of August, 1982.

Shirley A. Bruckner

Notary Public

SHIRLEY A. BRUCKNER
GENERAL
NOTARY
COMMISSION
EXPIRES
AUGUST 14, 1983
STATE OF NEBRASKA

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

ROBERT D. ST. VRAIN
CLERK

U. S. COURT & CUSTOM HOUSE
1114 MARKET STREET
ST. LOUIS, MISSOURI 63101

TELEPHONE NUMBER
425-5600
AREA CODE 314

July 1, 1980

Mr. J. William Gallup
Attorney at Law
Penthouse - Farm Credit Building
Omaha, Nebraska 68102

Re: No. 80-1561. Jesse J. Ford, Appellant vs. Robert F. Parratt, Warden, Appellee. (District Court Number CV-78-L-209)

Dear Mr. Gallup:

Enclosed for your use is a copy of CJA Form 20 which provides for your appointment to represent this appellant under the provisions of the Criminal Justice Act as amended. You should keep an accurate record of your time in this case and of any expenses which you incur. Please refer to Section VI of the enclosed Plan regarding compensation for your representation of this appellant. After the case is closed, the two white copies of Form 20 are to be returned to this office for Court approval. You are to retain the yellow copy for your personal files.

Also enclosed is an appearance form, which is to be completed and returned to this office immediately. Kindly file five copies of your typewritten brief with this office and serve an additional copy of your brief on the Attorney General. You should also send a copy of your brief to the appellant personally. Typewritten briefs are to be on letter-size paper and fastened in the left margin. The cost of printing will not be allowed as an expense. However, the cost of xeroxing or similar copying services is reimbursable. You should govern yourself in accordance with the provisions of amended Local Rule 11.

If you have any questions concerning this appointment or Court policies and procedures, please call this office. This appointment is a personal appointment and cannot be delegated to someone else without prior Court approval.

Robert D. St. Vrain
Clerk of Court by K. Knuecke

kdk
Enclosures
cc: Mr. Jesse J. Ford, P.O. Box 81248, Lincoln, Nebraska 68501
Hon. Paul L. Douglas, Attorney General, State Capitol Building, Lincoln, Nebraska 68509
Mr. William L. Olson, Clerk, U.S. District Court, P.O. Box 129, Omaha, Nebraska 68101
Mr. W. Wayne Buckner, Appeals Expediter (314) 425-5888
FTS# 279-5888